(13)

No. 97-1536

In The

Supreme Court of the United States

October Term, 1997

STATE OF ARIZONA ex rel. Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The Arizona Court Of Appeals, Division One

REPLY BRIEF FOR PETITIONER

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The issue in this case is whether Congress has pre-empted a state tax on a non-Indian contractor doing business with the United States on an Indian reservation. Respondent, Blaze Construction Co., Inc. ("Blaze"), cannot establish such pre-emption, "either expressly or by plain implication." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175-76. Blaze asserts that the tax that the State of Arizona ("State") imposed *should* be pre-empted by federal law, but most of its arguments are mere policy arguments that should properly be made to Congress, not to this Court. Moreover, none of the three branches of the federal government support Blaze's position that federal contractors should be immune from generally applicable state taxes for work performed on an Indian reservation. Congress clearly lacks intent to pre-empt: none of the statutes Blaze cites purports to reverse Congress' general acquiescence in state taxation of federal contractors and the primary statute relied upon by Blaze, the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, does not even regulate the contracts being taxed in this case. This Court plainly held that states may tax federal contractors in *United States v. New Mexico*, 455 U.S. 720 (1982), and in *Cotton Petroleum* the Court established the validity of state taxes on activities within Indian reservations that have only indirect effects on tribal interests. The brief filed by the United States in this case forcefully presents the executive branch's position that federal contractors doing work for the Bureau of Indian Affairs ("BIA") are subject to state taxes. In light of the federal government's complete lack of support for Blaze's policy arguments, and the clarity of the governing law, Blaze's claim of tax

immunity must fail, and this Court should reverse the court of appeals' contrary holding.

I. FEDERAL CONTRACTORS ARE TAXABLE UNDER THE GENERAL RULE OF *UNITED STATES v. NEW MEXICO*.

Blaze argues that state taxes imposed on Indian reservations should always be analyzed under implied pre-emption principles, utilizing a freewheeling balancing of interests. Blaze's position is unsupported by either reason or this Court's prior decisions. While this Court has developed flexible rules to consider issues of state taxation on Indian reservations, it has not developed this balancing of interests approach based upon any virtue inherent in flexibility, but because determining the bounds of state and tribal powers often requires it to analyze the interests at stake on a case-by-case basis. This Court has not hesitated, however, to adopt categorical rules when, as here, circumstances justify such rules.

For example, this Court has adopted a categorical rule that federal law pre-empts state taxes imposed directly on Indian tribes and tribal members. *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). In adopting a categorical rule, this Court explained:

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 214 n.17 (1987); *see also Duro v. Reina*, 495 U.S. 676 (1990) (holding that Indian tribes may not assert criminal jurisdiction over nonmember Indians; rejecting lower court's test for determining criminal jurisdiction that would require the consideration of each individual's "contacts" with the reservation). Thus, balancing of interests is not required in every case, and the Court will adopt a bright-line test when the interests at stake do not require a case-by-case approach.

Here, the Court has repeatedly and thoroughly addressed the issue of federal contractor tax immunity and it is apparent that no federal tradition bars state taxation of such contractors. Similarly, because no tribe is a party to the contracts and no tribal money is used to pay the contractors, the effects of such taxation on the tribes are attenuated, uncertain, and indirect. *See* Br. for U.S. at 18-24. Accordingly, tribal sovereignty does not suggest that Congress intended to pre-empt state taxing jurisdiction. *See* Br. for Pet. at 15.

This Court adopted the categorical test applicable to the issue of direct taxes on tribal members because it can be assumed that state taxes will *always* directly and substantially infringe upon tribal interests. A similar, but opposite, conclusion is appropriate here. Where the state tax is imposed on a nonmember contracting with the United States, the Court can assume that the taxes will *never* directly and substantially infringe upon tribal interests. While this Court has been quick to protect tribes and

those with whom tribes do business from state laws against which they have few defenses, tribal interests in these transactions are remote and indirect and the United States' involvement ensures that any tribal concerns are not ignored.

Blaze's argument that the Constitution's Interstate Commerce and Foreign Commerce Clauses provide analogous examples of the use of balancing tests is unhelpful and wrong. Br. for Resp. at 22-24. Blaze confuses the multi-prong tests used to determine the validity of taxes under those clauses with the multi-factor balancing of interests test used in Indian implied pre-emption doctrine. Under the Interstate and Foreign Commerce Clauses, each of the enumerated factors must be satisfied; there is no balancing between them, i.e., a discriminatory tax on a foreign corporation cannot be saved because the taxpayer has an especially strong nexus with a state.[1]

Similarly, Blaze's argument that the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, somehow

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[1] In any event, application of the Interstate and Foreign Commerce Clause analyses here would lead to the Arizona tax being sustained, because both the four-part Interstate Commerce test and the six-part Foreign Commerce Clause test would easily be satisfied. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-29 (1981) (rejecting argument that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of services provided to the activity); *Barclays Bank v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (rejecting argument that state tax prevented the nation from speaking with one voice when Congress had not established a clear policy barring state taxation).

prevents this Court from adopting a bright-line test applicable to nontribal members who contract with the United States is not supported by the language of that clause or this Court's precedents. Br. for Resp. at 24, 42. The Indian Commerce Clause states that "Congress shall have Power . . . To regulate Commerce . . . with Indian Tribes." The tax at issue here is imposed on a contract between the United States and a business owned by a nontribal member. The language of the clause shows that it does not control here because there is no commerce *with* a tribe or tribal member. Moreover, this Court has held that the pre-emptive force of the Indian Commerce Clause is strictly limited. *See Cotton Petroleum*, 490 U.S. at 192 ("[T]he fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce 'among' States with the mutually exclusive territorial jurisdiction to trade 'with' Indian tribes.") and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes."). Thus, the Indian Commerce Clause provides no support for Blaze's arguments.

Therefore, this Court should apply the general rule that state taxes on federal contractors are permissible unless Congress expressly pre-empts them without regard to where in the country – on or off an Indian reservation – the contractors perform their work.

II. A STATE TAX ON CONTRACTS BETWEEN THE UNITED STATES AND NONTRIBAL MEMBERS IS NOT IMPLIEDLY PRE-EMPTED BECAUSE CONGRESS HAS NOT SHOWN BY PLAIN IMPLICATION ITS INTENT TO BAR SUCH A TAX.

A. Federal Law Does Not Pre-Empt Every State Tax That Affects Tribal Decision-Making.

Blaze's principle argument is that the Arizona tax should be pre-empted because it affects tribal decision-making. Such a grossly overbroad reading of federal pre-emption is simply not the law. This Court expressly rejected Blaze's position in *Cotton Petroleum*, where it found no support in modern law for the proposition that "[a]ny adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax." 490 U.S. at 187. This refusal to resurrect the "long-discarded and thoroughly repudiated doctrine" of intergovernmental tax immunity, *id.* at 187, for on-reservation transactions is even more compelling when the transaction is between a private party and the United States. *Id.* at 175 ("Under current doctrine, however, a State may impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe.").

Congress has not shown an intent to pre-empt every state tax that indirectly impacts a tribe, and none of the statutes that Blaze relies upon purports to do so.[2] While

[2] Blaze fails to cite to the Buy Indian Act, 25 U.S.C. § 47, which it relied upon below, much less rely upon that statute to

the Self-Determination Act seeks to encourage tribes to assume control over services on their own reservations, nothing in the Act demonstrates "that Congress intended to remove all [state-imposed] barriers to profit maximization" with respect to any and all federal contracts. *Cotton Petroleum*, 490 U.S. at 180. As the United States itself has stated, "[n]othing in the [self-determination] regulations suggests an affirmative intent to sweep away every principle of state law that might influence Tribes as they make that choice." Br. for U.S. 27-28.[3]

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defend the judgment below. Because Blaze's ownership by a nonmember Indian is only relevant in the context of the Buy Indian Act, the suggestion by Amici Adson, et al., that this Court overrule its decision in *Colville* that nonmember Indians are to be regarded as non-Indians for state tax purposes is not properly before the Court. Br. for Adson, et al. at 16-18. In any event, it is apparent that Congress has accepted this Court's decision, as evidenced by its failure to change the law, and the Court has no compelling reason to reconsider this nonconstitutional holding.

[3] Although not relevant to any legal issue here, Blaze mistakenly asserts that the State should have objected to Eddie Ward's testimony at the administrative hearing concerning self-determination contracts. Br. for Resp. at 6 n.3 and 31 n.18. The State has never objected to the admissibility of Mr. Ward's testimony, only to Blaze's interpretation of that testimony and the weight to be given to it. Mr. Ward specifically testified that he was not involved in the financing of projects, JA 54-55, so his testimony on this topic is plainly unpersuasive, particularly in light of the official position taken by the United States in its own brief. Br. for U.S. at 23-24. Moreover, his statement that there is no difference between a contract between the BIA and a private contractor, and a contract between a tribe and a private contractor, Br. for Resp. at 10 ("The only difference between the two contracts is 'whose name is on the contract.' "), highlights his unfamiliarity with federal policy as set by Congress. The

Acceptance of Blaze's argument that any state law that affects tribal decision-making must be pre-empted would lead to untenable results. For example, non-Indians employed by a tribe are subject to state income tax, while tribal members who live and work on their own reservations are not. This difference in taxation would, according to Blaze, hinder a tribe's sovereign right to hire employees because the employees subject to state taxation might demand to be paid more, so state taxation of the non-Indian employees must be barred. Similarly, this Court held in *Cotton Petroleum* that a state may impose nondiscriminatory taxes on non-Indians engaged in mineral extraction on a reservation, yet it is clear that a state could not impose the same taxes on a tribe that directly mined its own resources. *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (striking direct tax on tribal royalties). Applying Blaze's argument, the imposition of the state tax on the non-Indian lessee would hinder tribal sovereignty because it might affect the tribe's decision whether to engage in the mining activity or to allow others to do it pursuant to a license or lease. Because the tax might affect tribal decision-making in this manner, the logic of Blaze's argument is that any such state tax would be barred, including, specifically, the taxes that this Court upheld in *Cotton Petroleum*. It is plain that this is not the law, and that any impairment of federal policy "that might be caused by these effects . . . is

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entire thrust of the Indian Self-Determination Act is Congress' recognition that there *is* a difference between a service administered by the United States and the same service administered by a tribe.

simply too indirect and too insubstantial to support [a] claim of pre-emption." *Cotton Petroleum*, 490 U.S. at 187.

Moreover, Blaze significantly overstates the interests of the tribes in the BIA's road construction activities. The statutes and regulations make it clear that the role of the tribes is advisory and that all final responsibility and authority remains with the United States. *See* 23 U.S.C. § 204; 25 C.F.R. § 170.3 ("[T]he Commissioner shall plan, survey, design and construct roads on the Federal-Aid Indian Road System."); 25 C.F.R. § 170.4a (tribe establishes priorities *subject to approval* of Commissioner); Br. for U.S. at 18-20; Br. of Navajo Nation at 3 ("The Secretary of Transportation must approve the location, type, and design of all projects on the Navajo BIA Road System."). Blaze's core theme is that the tribes have sovereign authority over road construction, but it is plain that the United States – not the tribes – is exercising such authority. Under the Self-Determination Act, each of the tribes had the opportunity to contract with the United States to obtain the funds to exercise sovereign authority over road construction. With regard to the contracts at issue here, none of the tribes did so. No tribe was a party to any of these road contracts. The United States was exercising its own sovereign powers and responsibilities, and no statute evidences any intent to give tax immunity to contractors doing business with the United States merely because an unexercised opportunity exists for a tribe to receive the funds necessary to provide the service directly.[4]

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[4] Blaze argues that congressional intent to pre-empt a state tax can somehow be implied from the provision in the Self-

Blaze's attempt to distinguish between tribal governmental and commercial activities is similarly unpersuasive. Br. for Resp. at 20-24, 26-27. This Court has refused to draw such a line where Congress has not done so. *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 118 S.Ct. 1700, 1703 (1998). Moreover, this Court has held that tribal sovereignty extends to activities traditionally regarded as commercial, so such a distinction fails to account for the realities of tribal government operations. *See Cotton Petroleum*, 490 U.S. at 167-68 (development and taxation of reservation resources); *Cabazon*, 480 U.S. at 216-20 (gaming facility); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (harvesting of reservation timber). Thus, Blaze's attempt to distinguish decisions of this Court upholding state taxes as somehow involving less important tribal interests than those at issue here simply misses the mark. Moreover, from Blaze's point of view the contract was merely a commercial contract. Accordingly, its attempt to claim tax immunity because of speculative and indirect effects upon tribes with whom it did not even contract fails as a matter of law.[5]

Determination Act allowing contracts to be reassumed by the United States. Br. for Resp. 32-33. As noted above, however, this statute does not even regulate the contracts at issue. Moreover, such a remote and speculative possibility "is simply too indirect and too insubstantial to support" Blazes' claim of pre-emption. *Cotton Petroleum*, 490 U.S. at 187.

[5] Blaze's strained analogy to the Foreign Commerce Clause of the United States Constitution, Br. for Resp. at 22-24, actually supports the State here by demonstrating that this Court will not lightly infer congressional intent to pre-empt state taxation in areas that have been especially entrusted to Congress to regulate. In *Barclays Bank* this Court explained that in foreign

Congress has not acted "by plain implication" to bar state taxes on federal contractors doing work on Indian reservations. The fact that such taxes may be a factor that a tribe or the United States considers in making decisions or that state taxes imposed on private parties may increase the costs that the United States incurs is not enough to trigger pre-emption. The same is true of any tax on a federal contractor, whether the contract is being performed on a military base, in a national park, or on an Indian reservation. *See* Br. for U.S. at 29 ("Precisely the same could be said of any state tax that falls upon a federal contractor being paid with federal funds for a particular purpose."). Therefore, the Arizona tax is valid.[6]

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commerce situations "Congress may more passively indicate that certain state practices do *not* 'impair federal uniformity in an area where federal uniformity is essential;' it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce. . . . [and] we discern no 'specific indications of congressional intent' to bar the state action here challenged." 512 U.S. at 323-24 (citations omitted; emphasis by Court). Congress has similarly been given special authority over Indian affairs, and this Court has recognized that congressional intent to bar state taxation will not be inferred lightly and that tax immunity must be granted "either expressly or by *plain* implication." *Cotton Petroleum*, 490 U.S. at 175-76 (emphasis added).

[6] Congress has not acted to bar state taxation of federal contractors doing work on Indian reservations, although the imposition of such taxes is by no means a recent development. *See Blaze Constr. Co. v. Taxation & Revenue Dep't*, 84 P.2d 803 (N.M. 1994) (upholding state tax on road construction for BIA), *cert. denied*, 514 U.S. 1016 (1995); *Arizona Dep't of Revenue v. Hane Const. Co.*, 564 P.2d 932 (Ariz. App. 1977) (upholding state tax on canal construction for BIA); *Matter of State Motor Fuel Tax Liab.*,

B. State Services Are Irrelevant In Determining The Validity Of A Tax On A Nontribal Member Doing Business With The United States.

Blaze argues that this Court's decisions require the State to justify its tax on federal contractors by showing that it provided direct services to the contractor in connection with the project. Br. for Resp. at 39-41. For authority, it relies on cases involving private parties contracting directly with tribes or tribal members, primarily *Bracker* and *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982). These cases, however, are not controlling in situations that do not involve any tribal member or tribal funds. *See* Br. for Pet. at 25-30 (discussing how the key facts in both *Ramah* and *Bracker* were that the taxes would plainly have to be paid from the contractors' receipts of tribal funds and that the controlling federal regulatory scheme directly governed business dealings with the tribes). Blaze fails to reconcile its interpretation of *Bracker* and *Ramah* with this Court's decisions upholding state taxation of nontribal members, particularly *Cotton Petroleum* and *Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994).[7] The State's

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273 N.W.2d 737 (S.D. 1978) (upholding state fuel tax on BIA road contractor); *G.M. Shupe, Inc. v. Bureau of Revenue*, 550 P.2d 277 (N.M. App. 1976) (upholding state tax on contractor building a dam for the BIA). If Congress wished to bar state taxation of federal contractors, it certainly could have done so in the recent Transportation Equity Act for the 21st Century, Pub. L. 105-178, 112 Stat. 107 (1998), especially in light of the New Mexico Supreme Court's 1994 decision upholding a state tax on Blaze's road construction work.

[7] Both Blaze and the court of appeals attempt to distinguish *Cotton Petroleum* by stating that the holding in section III of the

position, on the other hand, reconciles this Court's precedents, *see* Br. for Pet. at 29-30, and presents this Court with an opportunity to establish a rule that is simple in operation and recognizes well-established state jurisdiction over non-Indian transactions, yet does not infringe on Indian tribes' authority over their own members and resources. *See also* Br. for U.S. at 25-26 ("Uniform application of the rule of *New Mexico* to all government contracts would pretermit any such inquiry, and therefore would avoid introducing an additional layer of complexity into cases falling at the intersection between state taxation of federal contractors and state taxation of matters involving Indians.").[8]

Moreover, while Blaze and its *amici* argue that the State has no authority to exercise its sovereign powers on the reservations, they plainly recognize the important

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opinion that there need not be a *quid pro quo* between state services and the activity being taxed is somehow distinct from the discussion in section IV of what services may properly be considered in determining state jurisdiction. Br. of Resp. at 9-40 n.21; Pet. App. 22. This technical reading misses the essential point that this Court made in *Cotton Petroleum*: that the extent of state services is not a legally significant factor when the tax is imposed on a nontribal member and has only indirect effects on tribal interests.

[8] Blaze also notes that some of its road projects are in remote locations. Br. for Resp. at 11-12. The State admitted this in its brief, but also pointed out that many of Blaze's projects connect to or are near state highways. Br. for Pet. at 4. A categorical rule that federal contractors are taxable will avoid a constitutional rule that turns on the distance between a construction project and the reservation boundary.

role state government plays in providing reservation services. The Navajo Nation notes that in the three state area in which the Nation is located, approximately *3,197 miles* of roads – over a third of the total miles of roads – are state and county roads. Br. of Navajo Nation at 8. Similarly, Blaze recognizes that the United States pays Arizona public school districts approximately $84,000,000 per year to support public school education for Indian children. Br. for Resp. at 14.[9] By authorizing these payments, Congress has not only recognized state responsibility and authority to provide services on Indian reservations, but also has actively encouraged them. Congress has not drawn a circle around Indian reservations and commanded states to stay out, but instead has plainly recognized the important and substantial role that state government plays on the reservations.[10]

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[9] Blaze implies that these federal payments somehow reimburse the State for the governmental expenditures that the State cites in its brief. Br. for Resp. at 14-15. That is not correct. All expenditures listed in the State's brief, Br. for Pet. at 5-8, are made from State funds. Federal payments supplement, but do not replace, these funds.

[10] Although the court of appeals' primary error in this case was in using a balancing test, even assuming that approach was valid it is plain that the court below erred by effectively giving no weight to the interest of the State in regulating non-Indian activities within the State. While the court assumed that tribes always have significant interests in on-reservation transactions, even those involving nontribal members, it failed to recognize the State's significant interests in transactions that do not involve tribal members. Similarly, while Blaze and it's *amici* emphasize the geographical component of tribal sovereignty, they ignore the geographical component of state sovereignty and the undisputed fact that each of the taxed transactions took

Business conducted within the State of Arizona, including business conducted with the United States, is taxable unless the imposition of the tax is plainly contrary to federal law. The State does not have to justify its taxes by showing that it provides specific services in connection with the taxed activities. The rule is not different merely because the transaction takes place on an Indian reservation.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' decision.

Respectfully submitted,

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place within the State of Arizona. This Court has reconciled the overlapping sovereignty of states and tribes by holding that "[u]nless and until Congress provides otherwise," states and tribes have "concurrent taxing jurisdiction" over non-members. *Cotton Petroleum*, 490 U.S. at 189. Any suggestion that a geographical component of tribal sovereignty carries particular weight cannot survive this Court's holding in *Cotton*.